PART 3:

THE CAREFUL ART OF REDUCING UNCERTAIN OUTCOMES

Chapter 9

Defining the Ambit of Regulatory Takings

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9.1 Introduction

In the first stage of the New Zealand Law Foundation Regulatory Reform project the following was concluded about regulation and New Zealand property rights:[1]

> New Zealand has settled into a distinctive pattern when it comes to property rights in land, in which the state has played a very large role by setting up state-guaranteed systems of title and by the nationalisation of key mineral and energy resources now administered by various kinds of licensing systems principally controlled by the Resource Management and Crown Minerals Acts. There seems little support for these basic structures to be disturbed.

The first stage also framed some issues around compensation for the so-called taking of property through regulation:[2]

> A focus on the protection of title to property has allowed the courts to retreat to the comfortable position of providing compensation where title is confiscated, or where regulatory takings are so extreme as to cause loss equivalent to takings of title to property. The problem with this approach is threefold.
>
> a It leaves open to the state, and many state agencies delegated authority to regulate real, corporate and intellectual property and the ability to introduce regulations which confiscate a very large part of the value of privately held assets without any requirement to provide compensation.
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> b It leaves open to the state the ability to nationalise those resources in which private rights of ownership would have been recognised under the common

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1 Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 143.

2 Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 143.

law, but for which the private owners held no formal title. The historical examples (water, petroleum) … are of continuing relevance because new economically valuable resources, not explicitly covered by formal title, will be covered in the future.

c It fails to provide an intellectually satisfactory framework within which contemporary recognition and enforcement of various rights recognisable under the Treaty of Waitangi, can be integrated into our approach to the protection of property. The political power of Māori in contemporary New Zealand society may allow them to achieve some compensation when (for example) customary rights are taken, but this is a highly unsatisfactory basis on which to run a legal system or a country.

In this chapter we explore the ambit of so-called regulatory takings of property and related issues further. Our focus in this chapter is to anchor the issues firmly to New Zealand's own political and legal contexts.

The problem of defining the acceptable boundaries between legitimate public action by the state and the protection of private property rights and interests is anything but straightforward, and is characterised by a diverse range of responses in a number of countries. The pivotal problem is not that of direct compulsory acquisition for public purposes, which New Zealand, like most other equivalent jurisdictions, regulates strictly, and which has long been fully compensable at market values – putting to one side for the present the particular problems associated with interests in Māori freehold land.[3] Rather, the issue is that of indirect impacts on property rights and interest by general-purpose licensing arrangements effected by resource nationalisation and management (for example, the Petroleum Act 1937) or environmental controls arising from, for instance, land-use controls and rights to take and discharge water (as under the Resource Management Act 1991). It is easy to assume that other countries have resolved this issue more successfully than New Zealand, a favourite example of supposedly successful resolution being the taking clause of the Fifth Amendment to the United States Constitution. In fact, as anyone familiar with this area of United States law will know, few parts of American property law have proved so contentious and difficult to apply in practice, notwithstanding the production of levels of case law and commentary that can only be described as colossal.[4] It seems important to avoid crafting a solution that will prove to be disproportionate to the actual problem. While New Zealand law probably would benefit from better clarification of the limits of acceptable regulation of property rights, how significant a problem is this either in actuality, or (what is not quite the same thing) public perception? If New Zealanders are, on the whole, more tolerant of public controls than people in other countries, then that of itself is relevant to forming an opinion on the scale of the problem. Answering that question requires a great deal of empirical research.

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3 The key statute here is the Public Works Act 1981, the most recent in a long sequence of public works statutes. The legislation treats public works takings as compensable and allows landowners to challenge the calculation of compensation. Most direct public works takings appear in fact to be resolved by agreement. There is little evidence to show that the basic principles of the legislation or its operation in practice are beset by serious problems.

4 In New Zealand we rarely, if ever, have a volume of case law that could be described as colossal given our relative size and consequent scale issues. However, this may be an example where extensive case law does not necessarily lead to resolution of the issues.

Environmental and resource management are one of, if not the most, significant areas for this research and so we analyse the issues raised in that area in this chapter.

Changes in telecommunications regulations have also raised issues about property rights and what amounts to a regulatory taking. In another part of the New Zealand Law Foundation Regulatory Reform Project the following questions were asked:[5]

> … to what extent is New Zealand's approach to property rights different to other similar jurisdictions and how might any differences be justified? For instance, why does Australia consider it necessary to pay (significant) compensation for the appropriation of property rights as a result of its ultra-fast broadband initiative, whereas under the same initiative in New Zealand, Telecom will receive no compensation for its enforced structural separation as a precondition of its participation in the initiative?

An example is the local loop unbundling and structural separation of Telecom's network business, Chorus, into an independent company as a precondition of Telecom's participation in the government's ultra-fast broadband initiative.[6]

There has also been a kind of structural separation in Australia but by a different process. In Australia, Telstra Clear owns the copper network and it leases the new fibre network to NBN Co (a government-owned entity). Part of the agreement with NBN Co[7] requires that TelstraClear migrate customers progressively to the broadband network.[8] NBN Co paid Telstra Clear compensation for this deal.[9]

In New Zealand, the network company Chorus has been structurally separated from the other parts of Telecom, making it a separate company so that Telecom does not have an unfair advantage over others involved in providing broadband services. Chorus will participate in the laying out of the new fibre network in partnership with the government. Telecom remains in control of wholesale and

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5 Alec Mladenovic "Network Industries: Electricity and Telecommunications" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 363.

6 See Paul Scott and David de Joux "Uncertainty and Regulation: Insights from Two Network Industries" (ch 11) in this volume

7 A similar deal was reached with Optus. See NBN Co "NBN Co and Optus sign Binding Definitive Agreement" press release (Australia, 23 June 2011), available at <www.nbnco.com.au>.

8 See Liam Tung "Government to break up Telstra: all the details" ZDNet (Australia, 15 September 2009), available at <www.zdnet.com.au>; NBN Co "NBN Co and Telstra sign Binding Definitive Agreements" press release (Australia, 23 June 2011), available at <www.nbnco.com.au>; Mitchell Bingemann and Jennifer Hewett "Telstra in $11bn NBN deal with Rudd government" *The Australian* (Australia, 21 June 2010), available at <www.theaustralian.com.au>; Jock Given "Take your partners: Public private interplay in Australian and New Zealand plans for next generation broadband" (2010) 34(9) Telecommunications Policy 540 at 545; and Dave Heatley and Bronwyn Howell "Structural separation and prospects for welfare-enhancing price discrimination in a new 'natural monopoly' network: comparing fibre broadband proposals in Australia and New Zealand" ISCR (New Zealand, 2010) at 4, available at <www.iscr.org.nz/n580,53.html>.

9 This action was arguably within the Australian constitutionally expropriation regime for compensation on "just terms".

retail operations. There has been no expropriation of Chorus as such; rather, a measure has been taken to ensure competition.[10] The structural separation approach is arguably analogous to the structural break up of Standard Oil in the United States. The question then becomes who, if anyone, has suffered a loss? Separation arguably entails a cost. It could also be argued that there is a loss of efficiency created by economies of scope, but the separation was to improve competition and, therefore, that reason was favoured over any economy of scope argument. There is also a possible loss in share value. However, Telecom and its shareholders do not necessarily lose in the long-term from the structural separation. The shareholders may potentially make a gain in shares in Chorus as well as Telecom. If the shareholder's gain one might well ask should they then compensate the government?[11]

With regard to alleged losses from local loop unbundling, Philip Joseph argued that if New Zealand law was different, the local loop unbundling would have amounted to a regulatory taking. He said that the unbundling:[12]

> … encroaches on economic and property interests and would constitute a 'taking' under American takings law. In the United States Telecom would have the constitutional right to offset its losses through compensation.

We do not necessarily think that would have been the result under United States law; but, perhaps more importantly, as was said in the first stage of this project, property rights are well defined in New Zealand[13] and any comparative approach is potentially flawed because different jurisdictions take different approaches towards property rights depending on their distinctive histories, politics and economies.[14]

We will not detail in this chapter why issues related to telecommunications have been dealt with differently in both New Zealand and Australia.[15] However, issues arising from the unbundling of the Telecom loop seem to have been one of the

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10 See discussion of general competition law issues in New Zealand and telecommunications specific regulatory issues in other papers in this project Paul Scott "Competition Law and Policy: Can a Generalist Law be an Effective Regulator?" (ch 5) in this volume; and Paul Scott and David de Joux "Uncertainty and Regulation: Insights from Two Network Industries" (ch 11) in this volume.

11 We discuss regulatory "givings" below. Our purpose in this chapter is not to establish whether or not the local loop unbundling was the best option. Rather, we refer to it as an example of what may fall under the very broad heading of regulatory taking, but as we discuss it is not compensable in New Zealand.

12 Philip Joseph "Local Loop Unbundling Review: The Legal and Interpretive Issues Governing the Commerce Commission Review under Section 64 of the Telecommunications Act 2001" (letter submitted to Commerce Commission by Telecom, 2003) at [36].

13 Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

14 Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

15 See Paul Scott and David de Joux "Uncertainty and Regulation: Insights from Two Network Industries" (ch 11) in this volume.

factors motivating the advocates of the property law principle in the Regulatory Standards Bill 2011. In this chapter we discuss that Bill and its possible successor, known initially as "Treasury Option 5". We follow that with an analysis of the existing takings regimes in New Zealand relating to foreign direct investment and New Zealand property owners' rights. The chapter then discusses where the line should be drawn between what amounts to a regulatory taking and what does not amount to a taking. Examples relating to public health, environmental regulation and resource expropriation are also discussed.

9.2 The Regulatory Standards Bill 2011 and developments

The Regulatory Standards Bill, introduced to Parliament in 2011, provided for "a series of principles of responsible regulation and their effect". With regard to the so-called taking of property the Bill provided that legislation should:[16]

> (c) not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—
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> (i) the taking or impairment is necessary in the public interest; and
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> (ii) full compensation for the taking or impairment is provided to the owner; and
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> (iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment.

The coalition agreement between the National Party and the Act Party, after the 2011 general election, included a clause where the parties agreed to a Regulatory Standards Bill.[17] It seems, at the time of writing, that the 2011 Bill will not be passed and the approach to regulatory takings and related property rights will change. The change would mean that rather than the principles being subject to possible action before the courts, parliamentary explanatory notes would address certain issues arising from the proposed regulation.[18] These explanatory notes would address certain questions. At the time of writing it is not clear exactly what form the questions will take, but at least as far as property is concerned, the question will likely ask if property is affected in some way, such as being taken or impaired. The use of explanatory notes would place the burden on the parliamentary process to disclose issues about the effects of proposed regulation.[19] In this chapter,

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16 Regulatory Standards Bill 2011, cl 7(c).

17 National-ACT Confidence and Supply Agreement, after the General Election 2011 (5 December 2011), available at <www.parliament.nz>. The agreement recorded (at 2): "the Minister for Regulatory Reform will work closely with the Minister for Finance to achieve a mutually agreed outcome, based on the Treasury's preferred option (Option 5), for enacting within the next 12 months."

18 This is known as Treasury Option 5. Treasury's Option 5 Regulatory Standards Bill Regulatory Impact Statement, available at <www.treasury.govt.nz>. See Rayner Thwaites and Dean Knight "Administrative Law through a Regulatory Lens: Situating Judicial Adjudication within a Wider Accountability Framework" (ch 14) in this volume.

19 Treasury's Option 5 Regulatory Standards Bill Regulatory Impact Statement, available at <www.treasury.govt.nz>.

therefore, we first discuss the clause as drafted in the Bill and the proposed explanatory notes option. Whatever the form of the law passed, certain questions remain the same, such as what is, or should be treated as, a regulatory taking. The difference is not in the question but in the remedy which is discussed elsewhere in this Regulatory Reform Project.[20]

The provision as drafted in the 2011 Bill amounted to a significant change in New Zealand public law and policy. New Zealand historically has been characterised by high levels of state involvement in the acquisition and management of natural resources. Notable examples of this include the nationalisation of petroleum in 1937,[21] geothermal resources in 1952–1953[22] and the expropriation of development rights in natural water in 1967.[23] None of these expropriations were compensable. Moreover, the provision as worded seemed to indicate that any regulation *whatever* which "impairs" property values is compensable. Quite what that means is far from clear.[24] All zonings of any kind imply impairments to some extent. The provision might even suggest that no zoning is possible at all without payment of compensation, which would in fact completely destroy the entire operation of the land use regulatory system that has been in operation since the enactment of the first effective Town and Country Planning Act in 1952. At the very least the provision would likely generate a torrent of case law in the ordinary courts as to what "impair" might actually mean, in the same way that the United States courts have struggled for nearly a century to define when regulatory takings are and are not compensable.

Even if the Bill was passed, there is no clear answer as to what a taking might amount to in the New Zealand context; however, if the Bill is not passed it is not

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20 Rayner Thwaites and Dean Knight "Administrative Law through a Regulatory Lens: Situating Judicial Adjudication within a Wider Accountability Framework" (ch 14) in this volume.

21 By the Petroleum Act 1937; see now Crown Minerals Act 1991, s 10. All petroleum and natural gas in New Zealand belongs to the Crown.

22 Geothermal Steam Act 1952; Geothermal Energy Act 1953; see now Resource Management Act 1991, s 354.

23 By s 21 of the Water and Soil Conservation Act 1967, also currently reflected in s 354 of the Resource Management Act 1991 (RMA). This provision underpins the entire consents system for regulating the taking and discharge of water provided for in the RMA, as does the Geothermal Energy Act 1967 for geothermal fluid (treated by the RMA as a water resource).

24 See the discussion in Richard Ekins and Chye-Ching Huang "In Search of Better Law-Making: Why the Regulatory Responsibility Bill won't deliver what it promises" (2011, Maxim Institute) at 12, available at <www.maxim.org.nz>, where they say, "There is no satisfactory settled legal understanding in any jurisdiction about what constitutes a government 'taking' of property, and therefore it is almost impossible to discern the likely scope of this principle. When one first thinks of property being 'taken,' what one is likely to imagine is the physical confiscation of tangible property." The authors refer to the taskforce that was set up and recommended the Regulatory Responsibility Bill, which preceded the Standards Bill. They continue (at 13): "The Taskforce argues … that severe impairment of property rights is tantamount to a taking. This is not true or at least not always true: banning a certain kind of dangerous vehicle from the road constitutes a severe impairment of property rights but is not a taking of those rights for communal use." See also, Neil Quigley and Lewis Evans "Compensation for Takings of Private Property Rights and the Rule of Law" in Richard Etkins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011).

clear what it should amount to then either. The Bill does not clarify the scope of either taking or impairment. Impairment suggests something less than expropriation of title or of the so-called taking having the complete effect of removing economic value of the land.[25] As drafted it seems to mean that any impairment would qualify for compensation. That approach would make New Zealand's takings regime wider than many jurisdictions, including Australia, the United States and Canada. We see no justification for having a more generous takings regime than any of those countries, and several arguments against it. This is not simply because the authors believe that either Australia or the United States have necessarily grappled successfully with the issues and thus their example should be unquestionably implemented. Rather, all of these countries have adopted systems of land use management and natural resource regulation and licensing that strongly resemble those of New Zealand, which in all of these jurisdictions have now become embedded into the existing legal structure and indeed the entire system of urban planning. If we are correct in our assessment of the effects of the Bill on the zoning system that we have long become used to in this country, then the onus seems to be on those who seek to alter it to convince their fellow citizens that such a drastic change is in fact required (as indeed would be the case in Australia or Canada). To date this has not occurred.

As mentioned above, the Regulatory Standards Bill looks unlikely to pass in the form of the 2011 Bill. Treasury Option 5 was subsequently mooted as a suitable alternative. Treasury Option 5 comes from the Treasury regulatory impact statement (RIS) that addressed the Regulatory Standards Bill[26] and is summarised as:[27]

> Drawing inspiration from Queensland's Legislative Standards Act, this Bill would formalise and expand the requirement for, and content of, an explanatory note accompanying legislation, and provide increased administrative and analytical support for Parliamentary scrutiny of legislation.

At the time of writing there is considerable policy work underway looking at various issues arising from Option 5, including:

- What would be included in any explanatory notes?
- Who would produce such notes and assure their quality?
- How is Parliament expected to monitor what has been disclosed in explanatory notes?

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25 A full taking or equivalent is in most jurisdictions the recognised basis for takings. Impairment is a lower standard and therefore potentially easier basis to fulfil the requirements for compensation.

26 The Treasury *Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act* (Treasury, March 2011) at 12, available at <www.treasury.govt.nz>.

27 The Treasury *Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act* (Treasury, March 2011) at 12, available at <www.treasury.govt.nz>.

We do not intend to replicate that work here, although we discuss such issues as they are relevant. In relation to the acquisition of property through regulation the Treasury has said:[28]

> We therefore suggest that the revised Regulatory Standards Bill require the explanatory note for a Bill to disclose:
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> - whether the Bill would implement or allow a compulsory acquisition of private property; and
> - if so identify the relevant clauses, explain the rationale, and identify any features in the Bill that might mitigate any potential disadvantages (which would include any provision for compensation).

By way of explanation the Treasury discussion paper further explains:[29]

> It is not intended that this provision would apply to "regulatory takings". That is, when governments regulate in such a way that property owners can no longer use their property. Urban planning laws often provide good examples of potential regulatory takings: land might be rezoned so that it loses most or all of its economic value. In such a situation, the government has not literally expropriated the land – the owner still holds title – but from the point of view of the owner the effect is the same.
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> There are many arguments that regulatory takings are equivalent to expropriations and should be treated in the same way. But the precise ambit of a "regulatory taking" is still unclear in law and theory. Considering the urban planning example above, how much economic value must be destroyed before the regulatory action qualifies as a "taking"? Would 50 percent be enough? These are complex questions to which different people would give different answers.
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> The lack of clarity around what constitutes a regulatory taking prompts us to require disclosure only in respect of literal expropriations. Requiring disclosure of regulatory takings would potentially require explanatory notes to a significant proportion of Bills to contain essays on the nature of property rights and appropriate government action.

Neither the Regulatory Standards Bill nor Option 5 would give rise to a constitutional right to property, which would be directly actionable before the courts. The Bill places the role of scrutiny on the legislative process and also, if not most dominantly, on the courts. Option 5 places the burden squarely on the parliamentary process.[30] These differences are important, but there are also some similarities. Both approaches require scrutiny over whether there has been an effect on property rights. Both approaches lead to the questions about the scope of property rights and how the owner's rights should be compensated or not because

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28 The Treasury *A Revised Regulatory Standards Bill: A Treasury discussion document with indicative legislation* (Treasury, August 2012) at 19–20.

29 The Treasury *A Revised Regulatory Standards Bill: A Treasury discussion document with indicative legislation* (Treasury, August 2012) at 20.

30 The burden seems to already be on the Cabinet process. In the Government Statement on Regulation, the statement is made that there will need to be a "strong case made for any regulatory proposals that are likely to … impair private property rights, market competition, or the incentives on businesses to innovate or invest …", see Hon Bill English and Hon Rodney Hide "Government Statement on Regulation: Better Regulation Less Regulation" (government statement, 17 August 2009), available at <www.treasury.govt.nz/economy/regulation/statement>.

of regulatory effects. The difference is that under the explanatory notes approach, any effect on property rights is raised as a matter for parliamentary consideration rather than as a legally actionable matter, unless the right to legal action otherwise has force in law because it is recognised as a property right. Some would advocate that economic loss caused by regulation should be compensable (and consequently are not likely to support Option 5); we discuss this view further below.

In this chapter we address some key issues about property and what amounts to regulatory takings. This analysis will give guidance, not only to what is an actionable taking;[31] but also what we suggest should or should not be an actionable taking under New Zealand law. This discussion is also potentially relevant to parliamentary consideration of the effect of regulation and discussion of those issues in explanatory notes.

In order to evaluate what is, or might be, a regulatory taking in New Zealand, some key questions need to be addressed. Those questions are broadly:

(1) Where do we draw the line to determine what constitutes a taking and what does not? (This includes what is a taking and what is an impairment.)

(2) If compensation was given for takings, who might be compensated and why?

(3) What is the relationship between regulatory takings and investment?

(4) Are regulatory takings all the same? Should takings all be treated the same? What factors mean that loss of value ought to be compensated or that the effect on property ought to be given weight by Parliament?

(5) The effects of constitutional protection of Māori collective property rights by:

   (a) the Treaty of Waitangi of 1840 and legislation giving effect to its principles (such as section 8 of the Crown Minerals Act 1991); and

   (b) under common law rules (that is, Native Title law).

We do not intend to set out extensively the law of takings in other jurisdictions in this chapter. Russell Brown has done this in a chapter in the first volume of the Regulatory Reform Project, but we draw on his work and discuss the law where appropriate.[32]

Before addressing the above questions we briefly discuss the takings regimes that exist in New Zealand at present. There are broadly three takings regimes in New Zealand. The first two both relate to foreign direct investment (FDI) and the third to New Zealand property and investment. FDI can be divided into investment that is part of the trans-Tasman relationship and other trade agreements relating to FDI (in this discussion we will also refer to the trans-Pacific Partnership negotiations).

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31 See Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

32 Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

9.3 Takings, impairment and foreign direct investment

Internationally, one of the most contested aspects of regulatory takings is where a private investor can take direct legal action against governments for economic loss.[33] The extent of the ability to sue might depend on what property rights can be compensated at domestic law, but a foreign investor may have other rights. What those other rights are depends on whether the country has entered any investment agreements and what rights investors have under any agreements; in particular, whether those agreements include any rights in addition to remedies at domestic law, such as investor-state arbitration. Investor-state arbitration allows the investor to take a state to arbitration to recover for expropriation or other types of so-called taking of assets, as defined under the relevant investment agreement. Action before domestic courts would be limited to any property rights found in the relevant domestic law. Thus, investor-state arbitration potentially gives greater options and consequently more expansive property rights to foreign investors. While better rights for foreign investors are not necessarily unusual, it seems that in New Zealand at least, there has not been a thorough discussion about why that should be so. Rather, it seems this is a policy that has arisen by default.

There is discussion in New Zealand about attracting more foreign direct investment.[34] If that is a goal, then it is also relevant that some commentators have argued that the availability for compensation for regulatory takings can distort investment decisions.[35]

> … compensation insures investors against states of the world in which their land would have higher value in the hands of government; as a result, property owners over-invest if they are guaranteed compensation for subsequent takings.

Commentators dispute this linkage between remedies and decisions to invest because correlation is not causation.[36] Even if the availability of compensation attracts foreign direct investment, one question that arises is whether the risk of

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33 Bilateral investment treaties (BITs) and free trade agreements (FTAs) frequently provide for this type of remedy for investors. Initially, the reason for investor-state arbitration was because it was seen as the most effective way to address expropriation of assets in developing countries with ineffective legal systems in which to bring a case. Such clauses are now also found in developed countries, FTAs and can cause difficulties. An example is the position of Australia, which is being sued by the Philip Morris company, under its BIT with Hong Kong as well as in the courts, about anti-smoking legislation, see Susy Frankel and Meredith Lewis "Trade Agreements and Regulatory Autonomy: The Effect on National Interests" Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 411.

34 See Daniel Kalderimis "Regulating Foreign Investment in New Zealand" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

35 Emma Aisbett, Larry Karp and Carol McAusland "Police Powers, Regulatory Takings and the Efficient Compensation of Domestic and Foreign Investors" (2010) 86 The Economic Record 367 at 369.

36 Oliver Hartwich, Presentation at Trans-Pacific Partnership Symposium, Auckland, December 2012.

having to pay compensation is a risk worth taking.[37] If compensation for expropriation of foreign direct investment is available for takings relating to land and also, beyond the realm of land, for other types of property, then that has the result of allowing takings compensation to privilege the foreigner over the local investor. That would arise if trade agreement investment rules gave better rights to investors than domestic law does. The simple way to avoid the situation is not to agree to extensive investor-state arbitration in free trade agreements (FTA).[38] Indeed, this is the situation in the trans-Tasman relationship.[39] In contrast, however, in its FTA with China, New Zealand has agreed to investor-state arbitration and the following compensation for expropriation or "equivalent measure":[40]

> 1. Neither Party shall expropriate, nationalize or take other equivalent measures ("expropriation") against investments of investors of the other Party in its territory, unless the expropriation is:
>   a. for a public purpose;
>   b. in accordance with applicable domestic law;
>   c. carried out in a non-discriminatory manner;
>   d. not contrary to any undertaking which the Party may have given; and
>   e. on payment of compensation in accordance with paragraphs 2, 3 and 4;
> 2. The compensation referred to above shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation measures were taken. The fair market value shall not reflect any change in value due to the expropriation becoming publicly known earlier. The compensation shall include interest at the prevailing commercial rate from the date the expropriation was done until the date of payment. It shall be paid without delay and shall be effectively realizable and freely transferable. It shall be paid in the currency of the country of the affected investor, or in any freely convertible currency accepted by the affected investor.

Several points arise. First, what is an "equivalent measure"? Does it mean something that falls short of full expropriation of title, but is arguably the economic equivalent? The answer is found in an annex which defines expropriation as including direct and indirect expropriation. Each is defined as follows:[41]

> a. direct expropriation occurs when a state takes an investor's property outright, including by nationalisation, compulsion of law or seizure;
> b. indirect expropriation occurs when a state takes an investor's property in a manner equivalent to direct expropriation, in that it deprives the investor in

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37 For a discussion of foreign direct investment in New Zealand see Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand – Further Analysis" (ch 3) in this volume.

38 This does not seem probable, but is an issue that has arisen in the current trans-Pacific Partnership negotiations.

39 Protocol on Investment to the New Zealand – Australia Closer Economic Relations Trade Agreement, February 2011.

40 New Zealand China Free Trade Agreement (signed on 7 April 2008, entered into force 1 October 2008), art 145, available at <www.chinafta.govt.nz>.

41 New Zealand China Free Trade Agreement (signed on 7 April 2008, entered into force 1 October 2008), Annex 13, cl 5.2, available at <www.chinafta.govt.nz>.

> substance of the use of the investor's property, although the means used fall short of those specified in subparagraph (a) above.

The inclusion of indirect expropriation gives a more generous treatment of foreign investors than New Zealand investors and, arguably Māori, whose loss of assets has either not been compensated for, or whose assets have been compensated in different ways. Second, expropriation or equivalent measures may take place for a public purpose, on certain terms, provided that compensation is paid. This is significant because of its likely cost, which may therefore potentially inhibit regulatory autonomy, in matters of public concern such as health and safety and may make resource management more difficult or create perverse incentives to avoid resource management that requires compensation for takings. The Annex also provides that:[42]

> Except in rare circumstances … such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.

This provides some comfort that the state retains the power to regulate in certain circumstances, but such regulation must be reasonably justified. That is a legal test that must be fulfilled rather than an agreement recognising regulatory autonomy over the stated matters of "public welfare, including public health, safety and the environment".

If a property clause along the lines of that in the Regulatory Standards Bill was passed, then arguably New Zealand investor rights may be brought in line with our trade and investment agreements. In fact, the Regulatory Standards Bill's approach could have a greater negative impact on aspects of New Zealand's regulatory autonomy, particularly in the area of health and safety. One question is whether the proposed explanatory notes process would ameliorate or exacerbate this concern. We discuss that below. Before turning to that and other specific examples, we discuss the issues about drawing the line between what does and does not amount to a regulatory expropriation or taking.

9.4 Drawing the line

In the first stage of the Regulatory Reform Project, Russell Brown, in a chapter about comparative takings law, advocates that compensation for regulatory taking should be available when the effect of the regulation, at issue, is the equivalent of an expropriation of title; that is when the effects represent a "complete deprivation of all economically beneficial uses".[43]

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42 New Zealand China Free Trade Agreement (signed on 7 April 2008, entered into force 1 October 2008), Annex 13, cl 5, available at <www.chinafta.govt.nz>.

43 Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

Brown also noted that the comparative approaches in different countries demonstrate the range of options from which New Zealand may choose.

9.4.1 *The approach in the United States and its Epstein articulation*

Those who favour compensation for regulatory takings tend to point to the takings clause of the Fifth Amendment to the United States Constitution, which – as is well-known – states that "nor shall private property be taken for public use without just compensation". This clause was probably inserted by James Madison to reflect the general sense of the common law that direct acquisitions of private property interests in land by the state were compensable. (There is a long-standing principle of English common law that statutes should be presumed to not take away private property rights without payment of compensation.[44]) Whether the drafters of the United States Constitution ever intended that these words would ever be used to invalidate land use controls is certainly unclear. The interpretation of the takings clause became a matter of crucial significance as a result of Justice Holmes' decision in *Pennsylvania Coal Co v Mahon*.[45] Holmes' decision has achieved a status in the public law of the United States that is equivalent to the constitutional text itself: "The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." It must be emphasised that by no means is it the law in the United States that *any* regulatory taking is compensable, as some might suppose – property can certainly be regulated "to a certain extent" – and it is only where the regulation goes "too far" it becomes recognised as a "taking".

Epstein in his oft-cited argument for compensating loss in value arising from regulation says:[46]

> To use the famous, if empty, expression of Justice Holmes: unless regulation goes 'too far', you don't have to compensate anybody for the loss of rights associated with the diminution in use value on the one hand or disposition value on the other.

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44 In *Colonial Sugar Refining v Melbourne Harbour Trust Commissioners* [1927] AC 343 (PC) at 359, Lord Warrington stated that "a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms." Statutes which nationalise resources can (and do) avoid the effects of this rule by simply stipulating that no compensation is payable. It has been held also that even where a statute does not specifically state that no compensation is capable, such an intention "may also appear by irresistible inference from the statute read as a whole": see *Westminster Bank Ltd v Beverley Borough Council* [1971] AC 508 (HL) at 529. Under the Foreshore and Seabed Act 2004, which expropriated the entire foreshore and seabed and vested it in "dominium" in the Crown a limited right of compensation was provided for local authorities only but for no one else, which arguably is sufficient to meet the "irresistible inference" test that the taking was non-compensable. For a discussion of the effects of the 2004 Act on private property rights see Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 133–135.

45 *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

46 Richard Epstein "Takings, Givings and Bargains: Multiple Challenges to Limited Government" (New Zealand Business Roundtable, Wellington, 2004) at 6–7, available at <www.nzbr.org.nz>.

> To make this scheme work, it is necessary to figure out how far is too far. From a structural point of view this is difficult. You cannot have a situation where if you go only 'so far' you pay nothing and if you go further you pay top dollar for the land, because the discontinuity creates massive incentives for the government to inch up the line but no further.

The notion of quantifying "too far", is, in Epstein's view, not very useful because it would predetermine the issue (the very issue that American case law necessarily has had to struggle with). It tries to answer the question by drawing a line based on loss. However, such an approach is, as Epstein suggested, arbitrary. Therefore, a better approach might be to not draw a line that quantifies losses in this way. Rather, it is better to analyse in what situations the property right will need to be compensated because of the type of regulation. Asking this question leads to a distinction based on the type of regulation and also, potentially, the relationship between the investment and the regulation. This different approach still distinguishes between losses, but it will not be dependent on the quantity of loss being the determinative factor. The quantity of loss is a valid metric from the view point of the claimant of loss, but that is not necessarily the appropriate calculation from what might broadly be called a public interest viewpoint. All claimants of an alleged regulatory taking will have a vested interest in claiming the maximum loss. The method of looking at type of regulation may lead to a different result because it could take into account the importance of the regulation and the function of regulation to change behaviour in order to achieve the regulatory goal. This, in part, reflects an approach in Sweden which recognises considerable regulatory taking but in some instances limits it according to the type of regulation, such as a historic building designation.[47] As will be explored further below, however, in the United States itself the focus has always been on the extent or impact of the regulation on the property owner, not the purpose of the regulatory taking. No particular type of taking (that is, by purpose) is particularly privileged. And indeed, the task of defining which types of taking should be so privileged as compared with others seems, in itself, to be fraught with difficulty. Privileging controls on historic buildings might appeal (say) to the authors of this chapter, but not necessarily to everyone. That said, however, the investment provisions in the China-New Zealand FTA, discussed above single out "the protection of the public welfare, including public health, safety and the environment".[48]

A focus on the type of regulation, however, need not exclude the level of compensation that too should be taken into account. Rather, what we suggest is that the type of regulation plays a significant, if not a predominate role. Also, rather than trying to structure the "too far" line on the amount lost, which is inevitably subject to valuation estimates, the type of harm or worsening of ownership may be a more workable categorisation.

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47 Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

48 New Zealand China Free Trade Agreement (signed on 7 April 2008, entered into force 1 October 2008), Annex 13, cl 5, available at <www.chinafta.govt.nz>.

Jan Narveson posits five possible ways that a person's ownership might be "worsened":[49]

(1) unrestricted worsening;

(2) worsening in respect of B's use of X itself;

(3) type-worsening: worsening in respect of B's ability to command similar resources (such as other pieces of land);

(4) utility-worsening: reducing B's level of utility;

(5) worsening in respect of B's previously-acquired possessions.

This approach does not provide a spectrum of the extent of the taking, but shows different sub-categories of taking that ought to give rise to different remedies (or perhaps in some cases, no remedies at all).

9.4.2 *Who bears the loss and the taxpayer*

The hard-line view of why regulatory takings of all kinds should be compensated is summarised by Steven Kates, who claims:[50]

> … a social system is emerging in which private property rights are increasingly taken away, one by one, by government control and regulation. Although the familiar takings clause protects owners against outright seizure of assets and people are protected from slavery, piecemeal takings of rights to use assets and talents have become increasingly frequent. Freedom of contract is being curtailed without compensation, even where it inflicts considerable losses upon owners. Regulatory takings erode the usefulness and the value of what we own, but these are proliferating under a different form of social control from communism and "hard" socialism. Governments no longer seek to take on the risk and the burdens of outright ownership. Somebody else can do the owning and good luck to them. But the rights to use property freely are subordinated to state purposes.

This argument is not entirely suitable to New Zealand's position. In particular, it does not recognise the situation, discussed in other parts of this project, where the government socialises the cost of property damage through regulation. Examples include the government bearing much of the cost of the leaky homes debacle.[51] Arguably, in a society where the state has to "pick up the tab" in situations of this kind, and is indeed willing to do so, there is an equivalent justification for state regulation, especially where the absence of such regulation might risk imposing heavy costs on the state (that is, on taxpayers). There does seem to be a general political expectation in New Zealand that the costs of regulatory failure – as the leaky homes affair clearly demonstrates – ought to be met by the state as the

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49 Jan Narveson "Property Rights: Original Acquisition and Lockean Provisos" (1999) 13 Public Affairs Quarterly 225.

50 Steven Kates "Private Property Without Rights" (2001) 17(4) Policy 32 at 33.

51 Brent Layton "Regulating the Building Industry – A Case of Regulatory Failure" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

representative of the community as a whole.[52] This could arguably involve a tradeoff whereby the political community, in turn, is willing to accept significant levels of regulation by which the state, in a sense, can protect itself. In fact, much of the discourse surrounding the leaky homes disaster has been a critique of a perceived relaxation of regulatory standards. In the wake of building failures in the Christchurch earthquake or the Pike River mine tragedy, if anything, there seems to be a call for stricter standards, and their more active enforcement by the state. In other words, there is a trade-off between state responsibility and a willingness to accept regulation that New Zealanders are prepared to accept (we doubt in this respect whether Canadians, Americans or Australians feel differently.)

These examples, however, may indicate that controlling regulation by purpose rather than by degree of impact should not be too readily dismissed. Regulations to promote health and safety in coal mines or to protect homeowners seem to be intuitively different from restrictions on property owners regarding economic activities (such as retailing in residential zones) or amenity controls (prohibition of clearing native forest or cutting down historic trees). Yet there remains an obvious subjectivity inherent in classifying by purpose nevertheless: some may see protection of native forest land on private property as pivotal and as a proper responsibility of the state.

A final point is that proponents of active curtailment of land use regulation in the interests of protecting private property rights tend to evince far less enthusiasm for any proposal that windfall increases in value arising from public expenditures ought to be taxed. Many have thought that the two are essentially the opposite sides of a single coin. The emphasis on the former, while ignoring the latter, is a significant reversal of priorities in New Zealand. In the 19th and early 20th centuries, and especially during the period of the Liberal administration from 1890–1912, there was a great deal of interest in taxing the unearned increment – as it was styled – both for reasons of social justice and as an alternative method of adding to public revenues. One colonial politician who became interested in this idea was Sir George Grey. After the end of his second New Zealand governorship in 1867, Grey spent some time in England where he met John Stuart Mill and became a convert to Mill's belief that unearned increments should be taxed by the state.[53] Returning to New Zealand, Grey reinvented himself as a radical colonial politician and was premier from 1877–1879. His colleagues included John Ballance, who was a disciple of the ideas of Henry George, a prominent American political philosopher who argued in his celebrated book *Progress and Poverty* (1879) that there should be a single tax based, essentially, on taxing unearned increments. Another New Zealand colonial politician influenced by these ideas was Sir Robert Stout, colonial premier from 1884–1887 and Chief Justice for 26 years. The Liberal Government never quite moved to a single tax, but it certainly did put in place policies designed to prevent land aggregation and protect public interests in land. One wing of the Liberal party believed that land acquired from Māori by the state should be granted

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52 See generally James Zuccollo, Mike Hensen and John Yeabsley "Weathertight Buildings and Performance-Based Regulation: What Lessons can be drawn from a Complicated and Evolving Situation?" (ch 12) in this volume.

53 James Rutherford *Sir George Grey* (Cassell, London, 1961) at 582.

to settlers in leaseholds rather than freeholds, and in the first decade of the 20th century the freehold versus leasehold debate was at the forefront of politics and occupied large amounts of parliamentary time. Policies that the Liberal Government implemented still strongly influence New Zealand land law to this day, including the "Queen's Chain" (a reservation of public rights of access to lakes, rivers and the coast in all Crown grants),[54] public ownership of much of the mineral estate and various kinds of statutory leasehold tenures. One can say, then, that New Zealand has a long and rich political tradition when it comes to discourse on the public component of land values, but historically the focus has been on taxing increases in value rather than compensating decreases caused by state programmes.

Henry George is no longer much read, and unearned increments are no longer a feature of political discourse, but this may indicate nothing more than that the debate on the relationship between land values and government action has been captured by one segment of the political community. In the 1970s the issue resurfaced in the United States with the publication of a remarkable book by Donald G Hagman and Dean Misczynski in 1978, with the self-explanatory title of *Windfalls for Wipeouts.*[55] More recently there has been some interesting writing in United States law journals on givings; that is to say, increases in private property values caused by government action.[56] Just as there can be such a thing as a regulatory taking there must, equivalently, be a counterpart – a "regulatory giving", when land-use regulation, such as a rezoning, pushes property values upwards. Regulation creates both winners and losers. There is simply no justifiable basis by which regulatory takings can be seen as compensable, while at the same time regulatory givings are seen merely as a happy stroke of good fortune. If one is compensable, the other should be taxable. However, just as not all regulatory takings in the United States are compensable (as will be seen, only some are), then arguably only some kinds of givings should be taxable; that is, where some level of

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54 The "Queen's Chain" (correctly land reserved from sale, or marginal strip) may reflect earlier surveying practices and, in fact, derives from s 110 of the Land Act 1892 (a Liberal Government measure), which provided that there was to be "reserved from sale or other disposition [that is, of Crown land] a strip of land not less than sixty-six feet in width along all high-water lines of the sea, and of its bays, inlets, or creeks, and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width exceeding thirty-free feet". On the political background to the Land Act 1892 see David Hamer *The New Zealand Liberals: the years of power 1891–1912* (Auckland University Press, Auckland, 1988) at 94–97. This provision was re-enacted as s 58 of the Land Act 1948. The current law is now contained in Part IVA of the Conservation Act 1987, as amended by the Conservation Law Reform Act 1990. The "Queen's Chain" became 20 metres in 1972: Land Amendment Act 1972, s 3(1)(a).

55 Donald G Hagman and Dean Misczynski (eds) *Windfalls for Wipeouts* (American Society of Planning Officials, Chicago (Ill), 1978). This book was an edited collection of readings. The essence of the Hagman and Miscynski approach was that the benefits obtained from taxing windfalls should be distributed to those suffering from "wipeouts". The two should cancel one another out (theoretically).

56 See, for example, Abraham Bell and Gideon Parchomovsky "Takings Reassessed" (2001) 87 Va L Rev 277; and Abraham Bell and Gideon Parchomovsky "Givings" (2001-2002) 111 Yale LJ 547.

unreasonable (or iniquitous) level of private benefit has been reached through public expenditure.

Along with many others, we agree that a debate on the proper limits of land-use control deserves to be re-energised. But it may also be time for the debate on the un-earned increment, which can certainly be said to be strongly rooted in New Zealand's own political traditions, to stage a come-back as well. American commentators have pointed out that "[w]hile takings – government seizures of property – have been the subject of an elaborate body of scholarship, givings – government distributions of property – have been largely overlooked by the legal academy".[57] In the United States the debate on givings runs up against the strict constructionalist argument that the Fifth Amendment relates only to takings, whether regulatory or otherwise: there is nothing in the Constitution about givings. In New Zealand we have no such inhibitions to trouble us. A debate on givings should be accompanied by a debate on takings; indeed, these questions really are different components of a single debate. Or, if it is objected that taxing givings is just too complicated and that nothing can be done but to stand aside and let the effects of regulation take their course, the same is equally true of regulatory takings. If we can live with regulatory givings, we might just have to live with regulatory takings.

In the remainder of this chapter we explore the areas of health and safety regulation, environmental regulation and the issue of resource expropriation.

9.5 Health and safety regulation

If a regime of compensating takings, other than expropriation of title to property, such as impairment is to be put in place, then New Zealand should retain sufficient autonomy over regulating for health and safety concerns. The same principle is applicable in the explanatory notes process. Even if the explanatory note suggests some impairment to property then, in our view, that should not trump legitimate public policy goals. We note that this may require discussion about what are those public policy goals and how regulation might protect such goals. We do not undertake the full ambit of that task here because each case will be different. Generally, however, health and safety raises particular concerns which under current New Zealand law for the most part, are not directly subservient to issues of impairment and we recommend that unless there is considerable evidence obtained to the contrary, the balance should stay that way.

Australia's recent plain packaging of tobacco laws may provide an example.[58] Broadly, under the Australian law, figurative or logo trade marks are not allowed on cigarette packaging.[59] Thus, some registered trade marks, which are personal

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57 Abraham Bell and Gideon Parchomovsky "Givings" (2001-2002) 111 Yale LJ 547 at 549. As they go on to observe, "[l]ike a reflection in a mirror, the massive universe of takings is everywhere accompanied by givings."

58 Tobacco Plain Packaging Act 2011, s 26 (Cth).

59 There are possibly other investments involved.

property, will become effectively useless.[60] If the title to the trade marks is not expropriated they remain registered to the company, but arguably the trade marks become economically equivalent in value as if they have been expropriated and title lost. The trade marks are almost certainly impaired.[61] New Zealand should not, for example, expose itself to potentially having to pay for impairment of trade marks in order to enact regulation permitting the plain packaging of cigarettes.

At the time of writing there are several challenges brought by Philip Morris and others against the Australian law. These challenges include, an action brought by Philip Morris Asia Ltd, under the Hong Kong-Australia bilateral investment treaty, for the measures comprising an improper expropriation (of trade marks). The outcome of the investment cases is not yet known, although much discussed.[62] Even if the Australian Government prevails, questions need to be asked about the ability to regulate for health and safety concerns if there is a threat of such legal action. Another action brought by several tobacco companies, under the Australian Constitution, for the measures being an ultra vires acquisition of property not on just terms was not successful.[63] A majority of the High Court found there had not been an acquisition of property because, in essence, the government had not taken title to the property.[64] Several of the judges noted, however, that the trade marks had diminsihed in value and had been "taken" or "impaired".[65] Justice Keifel, for example, said:[66]

> … It may be accepted that some or much of the value of their intellectual property has been lost in Australia. A trademark that cannot be lawfully used in connection with the goods to which it is relevant is unlikely to be readily assignable. The

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60 This raises many issues about compliance with World Trade Organization Agreements, in particular, the Technical Barriers to Trade Agreement and the TRIPS Agreement, see discussion in Susy Frankel and Meredith Kolsky Lewis "Trade Agreements and Regulatory Autonomy: The Effect on National Interests" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011); and Susy Frankel, Meredith Kolsky Lewis, Chris Nixon and John Yeabsley "The Web of Trade Agreements and Alliances and Impacts on Regulatory Autonomy" (ch 2) in this volume; see also Susy Frankel and Daniel Gervais "Plain Packaging and Interpretiation of the TRIPS Agreement" (2013, forthcoming).

61 *JT International SA v Commonwealth of Australia* [2012] HCA 43.

62 See Tania S Voon and Andrew D Mitchell "Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia" (2011) 14(3) JIEL 515.

63 The Ukraine, Honduras and the Domincan Republic have requested consultations under the auspices of the World Trade Organization. See *Australia- Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/R (panel established but not yet composed, 28 September 2012); *Australia- Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R (in consultations, 4 April 2012); *Australia- Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS441/R (in consultations, 18 July 2012).

64 *JT International SA v Commonwealth of Australia* [2012] HCA 43. Only Justice Heydon dissented on this point at [210].

65 *JT International SA v Commonwealth of Australia* [2012] HCA 43 at [138] and [141].

66 *JT International SA v Commonwealth of Australia* [2012] HCA 43 at [356].

> restriction on the use of the marks is likely to have effects upon the custom drawn to their businesses and upon their profits.

If New Zealand had plain packaging law equivalent to that recently passed in Australia,[67] and a takings regime such as that proposed in the Regulatory Standards Bill, then affected tobacco companies might be able to claim compensation in several million dollars on the basis that their assets are impaired. If the Option 5 explanatory notes process takes place then the parliamentary process would weigh any alleged effects on property against the health and safety purpose. It could conclude that health and safety outweighed concerns about alleged impairment of property, but if the government was subject to investor-state arbitration it may weigh matters differently, given the possibility of being sued or paying compensation greater weight and, thus, arguably compromising the health and safety goals of some regulation.

In our view, the effect of improving any takings regime should not be at the expense of limiting the ability to making health and safety regulation because, among other concerns such as regulatory autonomy, it will be too costly to do so. The consequence of this is that where the public purpose is for an important health or safety concern then that should hold considerable weight in any explanatory notes process. We are also of the view that if compensation for such impairments was to be part of New Zealand domestic law, then such compensation should not be available or should be lessened. That is not an easy rule to make, but arises from our above discussion of where a regime of takings might rationally draw the line. The line is usually discussed within the frame of what should be available compensation. However, in our view, the line is equally relevant to the weight, if any, that the explanatory note process should give to alleged property impairment or takings.

Another potential problem area, and a risk for government liability, could be controls on acquisition of land in New Zealand by foreigners. Again there is a clash of competing public values (protection of private property rights, including the right to sell and purchase land) and the right of any society to protect itself from acquisition and control of its land and land resources by powerful overseas corporations or foreign governments. Should a New Zealand entity, prevented from selling land profitably to an overseas body, be entitled to claim compensation in New Zealand courts?[68] (The view of the authors is "No", but the point is made to underline the observation that what seems to be a straightforward and obvious reform exercise might readily lead to serious infringements on the power of the state in areas where many New Zealanders might perceive the exercise of such powers as legitimate or even vital.) In the following parts we discuss environmental and resource regulation to further illustrate our central theme that property rights is not an absolute value.

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67 At the time of writing Cabinet has indicated an intention to pass such law, see Ministry of Health "Proposal to introduce plain packaging of tobacco products in New Zealand" Consultation document, July 2012.

68 See also Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand – Further Analysis" (ch 3) in this volume.

9.6 Environmental regulation

Under United States law, essentially where regulation amounts to de facto compulsory acquisition, it then becomes compensable. Ever since the formulation of this famous test, United States law has struggled with the issue of how far is *too far*. In general, most land use regulation in the United States is *not* compensable. (Zoning is not ipso facto a taking in the United States – as was expressly recognised by the Supreme Court as long ago as 1926.[69]) Regulation of land within acceptable limits is regarded as an exercise of the police power, and no compensation is required; but if it exceeds these limits it becomes an exercise of the eminent domain power and is invalid if just compensation is unavailable. (Nor does just compensation necessarily have to involve a cash payment, as will be seen.) The vital question of determining what these limits are has vexed courts and commentators since 1922, and has led to the production of interminable numbers of judicial opinions and scholarly articles and books.[70]

Because legislation which violates the Fifth Amendment is unconstitutional and can be invalidated by the courts under American public law, the law in the United States has become characterised by an almost excessive fixation on the constitutional limits of land-use control. Here, the contrast with New Zealand could not be more marked. The issues raised by – for instance – controls on historic buildings (an issue which has loomed large in the American case law and literature) are, of course, exactly the same in this country, but they have lacked this constitutional dimension to bring them into focus.

Academic discussion of takings in the United States show little evidence of any consensus on the issue but is polarised into two opposing groups, that is – unsurprisingly – those who favour strict land-use regulation in order to protect either the built or the natural environment, and those who are opposed to this and who favour landowners and developers being allowed to do what they want. To borrow terminology developed by Professor John Costonis in a famous article published in 1975,[71] the competing groups can be characterised as police power enthusiasts, who favour an expanded police power and strict environmental regulation, and the private marketeers – those opposed to governmental controls on land use and the adherents "of an economic philosophy associated principally with the University of Chicago".[72] (A quarter of a century further on, the situation has not changed much.) Such a divergence of academic opinion no doubt reflects an absence of consensus in society on this issue, and in this respect the situation in New Zealand is once again no different. Professor Costonis sought to devise a way out of what had become a hopeless impasse by devising what he called the

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69 *Village of Euclid v Amber Realty Co* 272 US 365 (1926).

70 Key articles are Frank I Michelman "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 Harv Law Rev 1165; and Joseph L Sax "Takings and the Police Power" (1964) 74 Yale LJ 36.

71 See John J Costonis "'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies" (1975) Columbia Law Journal 1021.

72 See John J Costonis "'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies" (1975) Columbia Law Journal 1021 at 1024.

accommodation power to lie between the extreme positions of the police power enthusiasts and the free marketeers, although this does not seem to have in fact had the desired effect. The law, in other words, cannot escape the politics of left and right, this being no less true of the Regulatory Standards Bill itself. The basic approach which the United States courts have applied (not always consistently) is that a valid exercise of the police power may become unconstitutional in an individual case if the restriction is such to deprive the landowner of a reasonable return. The leading case is the decision of the United States Supreme Court in *Penn Central Transportation Co v City of New York*.[73] In this case the plaintiff was the owner of one of New York City's most famous landmark buildings, Grand Central Terminal. New York City designated the building as a land building under the City's Administrative Code, which meant that reconstruction, demolition or construction of the building required the permission of the NYC Preservation Commission. Acting in concert with a developer who had purchased from the owner the air rights above the structure, Penn Central made an application to the Commission to construct a 50-storey office building on top of the Terminal, and when this was rejected, brought an application for declaratory relief, injunction and damages on the basis that the applicable code provisions authorised an unconstitutional taking without just compensation. It was not successful.

The trial Court held that there was a taking, but this was reversed by the Appellate Division, with reversal being upheld both by the New York Court of Appeals – a very powerful and prestigious court in the United States system – and the United States Supreme Court. The Supreme Court held: first, that historic preservation was not, per se, invalid as an exercise of the police power; and, second, that on the facts of the case there had been no taking requiring the payment of compensation. Justice Brennan, who wrote the majority opinion, applied the reasonable return test in finding that there was no taking on the facts:[74]

> … the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits, but contemplates, that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions.

In evaluating the impact of the land use controls on the owners, the Supreme Court emphasised that the regulation did not amount to a blanket prohibition of any development in the airspace above the Terminal. A development that was in harmony with the building might well have been approved (on the facts, no application for such a limited development had been made). It also so happened that the owners could have availed themselves of the transferable development rights option in the plan, which allowed the transfer of unused airspace above certain building lots – those designated for their historic or architectural significance; for instance, to other sites around the city, which could then be built to a density in excess of the usual restrictions in the plan. Transferable development rights are an attempt to allow the building development process to itself generate a kind of compensation by providing for a market in airspace

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73 *Penn Central Transportation Co v New York City* 438 US 104 (1978).

74 *Penn Central Transportation Co v New York City* 438 US 104 (1978) at 136.

transfers. The availability of this option was another reason why the regulation was not compensable:[75]

> … it is not literally accurate to say that [the owners] have been denied all use of even those preexisting air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. … While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

The *Penn Central* decision is best-known for recognising the reasonable return test at the highest levels of the United States system. Our argument is that a case such as *Penn Central* is highly instructive when considering whether New Zealand should legislate to protect landowners against de facto takings by regulation. A first point to note is that which has been made already: the United States does not make all land-use regulation compensable per se. Any attempt to extend United States law quite that far would certainly be regarded as a highly contentious and indeed politicised project. Landowners can expect to be subject to land use controls for the greater good, even comparatively irksome ones. (It can be added here that in other cases the American courts, including the Supreme Court, have also found that merely requiring that a permit is required before a certain activity is permitted is not a taking: after all, the permit might be allowed.) Second, whether any particular regulation should attract compensation requires a very specific inquiry which must focus closely on the extent to which the landowner's options really are circumscribed, to what extent, and whether the effects are mitigated by other aspects of the regulatory instrument or plan. The type of inquiry embarked on in *Penn Central* was very closely-focused and sophisticated. If United States law is being upheld as the model, then the statutory threshold would require that the regulation was sufficient to prevent a landowner from realising a reasonable return on his or her investment, taking all circumstances into account.

9.7 Resource expropriation

A key dimension of New Zealand legal history is a noticeable tendency on the part of governments to nationalise important national resources. Oil and natural gas was nationalised by the Petroleum Act 1987, geothermal fluids by the Geothermal Steam Act 1952 and the Geothermal Energy Act 1953, and development rights with respect to water by the Water and Soil Conservation Act 1967. These earlier nationalisations are now preserved by section 10 of the Crown Minerals Act 1991 and section 354 of the Resource Management Act 1991. At first sight it may appear that the New Zealand state is somewhat unusually or atypically prone to nationalise natural resources, but, in fact, in this, as in so many other fields, New Zealand was not particularly an innovator, but followed precedents established elsewhere. New

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75 *Penn Central Transportation Co v New York City* 438 US 104 (1978) at 137.

Zealand nationalised petroleum in 1937 largely because Britain had done the same in 1935. (In neither country was there a significant petroleum industry in existence at the time of nationalisation.) Nationalisation of petroleum in both Britain and New Zealand was not opposed, but was supported by, the petroleum industry (oil companies prefer to deal with governments rather than with a multiplicity of private owners). New Zealand has nationalised petroleum, meaning petroleum and natural gas in the ground, but it has never contemplated nationalisation of the petroleum industry, as some countries have certainly done (Mexico, for example). There was a sustained debate over the nationalisation of coal in New Zealand in the late 1940s, which was almost a rerun of events in Britain: in both countries a Labour government nationalised coal, and a Conservative government denationalised it. New Zealand's coal reserves today are mainly privately owned. In fact, much more of the national mineral estate is owned privately in New Zealand than is the case in Australia.

New Zealand's historic commitment to an inclusive economy[76] has meant also that the state did not nationalise resources in order to profit from this directly, still less to grant away formerly privately-owned resources to the relatives and cronies of politicians (as has happened in so many places), but rather with the fairly innocuous aim of creating a platform for licensing and regulation. The geothermal resource is not, for instance, closed off to private developers. Rather, such developers need to obtain a permit to exploit it, the permitting system now controlled by the resource consent system of the Resource Management Act 1991, administered not by central government but regional councils. Without the resource being nationalised there could be no legal foundation for a system of regulatory consents. But a key difference with Britain – although not the United States or Australia – is that so much land is in Crown direct ownership, in fact about one-half of the land area of the country. As a landowner, the Crown owns the subsurface mineral estate under ordinary rules of common law. Perhaps what is most surprising is the complete absence of any tradition of legal scholarship on public lands and rights of access to them such as would be readily found in jurisdictions such as Arizona or New Mexico where similarly large areas are held directly by state and federal governments.

That the issue of resource expropriation, however, remains a live one in New Zealand public law is demonstrated by the long-running legal drama over proprietary interests in the foreshore and seabed. It provides a convenient illustration of some characteristics of New Zealand's approach to the regulation of natural resources, the pitfalls that this can entail, and also of the shifting

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[76] See, generally, Daron Acemoglu and James A Robinson *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books, London, 2012). As many readers of this chapter will be aware, the authors of this book have famously argued that the key to national prosperity lies not in economic policies but rather in political institutions. The authors regard New Zealand as one of a few dozen countries (along with Britain, Canada, Australia, Scandinavia, the United States, Japan, South Korea and so on) with inclusive political and economic institutions (at 42, 45, 50 and 282).

configurations of national politics The main narrative[77] runs from 2003, the date of the Court of Appeal's decision in *Attorney-General v Ngati-Apa*[78] to 2011, when the National-led Government legislated into place its own solution of this vexed matter, the Marine and Coastal Area (Takutai Moana) Act 2011. Whether this latest attempt will endure at a statutory resolution remains to be seen.

The foreshore and seabed controversy is a perfect example of a clash between proprietary rights and wider public interests. In this case the proprietary rights happen to be those belonging to Māori, which – as explained in *Ngati Apa* – amount to a right to bring a case in the Māori Land Court which *could* issue a private freehold right in a defined area of foreshore and seabed. The public interests are those associated with the foreshore and seabed, including rights of navigation and access to ports and licensing of coastal space, although what looms largest in the public mind was the cherished ability of New Zealanders to enjoy a day at the beach, widely – although not very accurately – perceived to be placed at risk.

The Labour Government's response to the legal issues set in play by the Court of Appeal in 2003 was the Foreshore and Seabed Act 2004 (FSA). One of the authors has argued elsewhere that this Act makes most sense when seen in the context of a long-established tradition of the nationalisation of key natural resources. The key trigger for nationalisation in every case arises from a new perception that something not widely known, or not generally perceived as readily exploitable, suddenly acquires new value as a result of new, typically technological developments. The New Zealand state nationalised geothermal resources in 1952–1953 when the country began to turn to new forms of energy resources after the 1939–1945 World War at a time when the generation of electricity from geothermal systems had become widely available. Arguably the coast has acquired new value in the same kind of way.[79]

The increasing importance and value of the coast and the emergence of a major legal controversy over ownership of the seabed and the foreshore are obviously interconnected. For much of New Zealand's history the coastal resource, if it can be called that, was both seemingly infinite and to a large degree not especially valued. Now, however, it has become scarce and valuable to a degree almost unimaginable 50 years ago. This change is partly because of: shifts in attitude; developments in international law; an increase in population; and technological developments that have facilitated marine farming in particular. Although the legal difficulties regarding the Crown's presumptive title to the seabed and foreshore have been present throughout the country's history, only recently has the issue flared into a major national controversy leading to a major national response by the state in the form of a substantial statute. The FSA is in many ways a further instalment in the chain of statutes by which the state has stepped in to control and sometimes to expropriate key natural resources once their value becomes apparent. Such

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77 Legal issues relating to competing interests in the foreshore and seabed generally, especially where Māori customary rights are at stake, have a much longer history, and indeed go back well into the 19th century. See, generally, Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 11–39.

78 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

79 Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 5.

nationalisation or expropriation (depending on one's viewpoint) creates a legal platform that allows the resource in question to be allocated and managed by central and local government.

An aspect of Native Title law is the presumption against extinguishment, which can be seen as reflecting the general assumption of the Common Law that the state should not be presumed to simply expropriate private property rights. Contrary to what is sometimes supposed, issues relating to ownership of the foreshore and seabed are not new, but have been a constant problem throughout the country's history. Foreshore and estuarine areas were pivotal to Māori, who developed a complex system of property rights with respect to estuarine areas such as the Firth of Thames, Tauranga harbour, Porirua harbour, the Manukau, the Hokianga and other places. The importation of English Common Law into the country brought with it conflicting tendencies: English law regarded the foreshore and seabed as presumptively belonging to the Crown (although the Crown's title could be displaced by proof of a grant, or by circumstances which indicated that a "lost" grant could be presumed); however, English common law also regarded native customary rights as cognisable and enforceable as an aspect of Native Title law. The New Zealand courts of the present day accept without hesitation the standard principle that onus of proof of extinguishment lies on the Crown and that the instrument said to have that effect must reveal a clear and plain intention on its face.[80] As it happens, however, the issue historically has not so much been the applicability of the Common Law of Native Title to the foreshore and seabed, but rather the effects of the Native Lands Acts on this area, and more particularly whether the Native/Māori Land Court had jurisdiction to hear and determine applications for investigation of title to it. It is this issue which has been the most important one, and it is no accident that our two most important Court of Appeal decisions on ownership of the foreshore, *In re Ninety Mile Beach*[81] and *Ngati Apa* were both concerned with the extent of the jurisdiction of the Māori Land Court.

The effect of the *Ngati Apa* decision of 2003 was that the Māori Land Court had jurisdiction to investigate the foreshore and seabed and to allocate titles to it. It is sometimes said that all that Māori acquired in 2003 was a right to go to court, but in fact this is to misunderstand the position somewhat. *Ngati Apa* changed the entire settings within which going to court functioned, and allocated – or restored – an entire jurisdiction to a long-established court which it had not been able to exercise for decades.

The government responded with legislation, this being the Foreshore and Seabed Act 2004. Specifically, the FSA vested all "public foreshore and seabed" – that is, all foreshore and seabed not in private title – in the Crown. Section 13(1) vested the "full legal and beneficial ownership of the public foreshore and seabed" in the Crown "so that the public foreshore and seabed is held by the Crown as its absolute property". The wording could hardly have been phrased in stronger terms, and was definitely intended to (and we would say, undoubtedly did) effectively

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80 *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (CA) at 655 per Cooke P; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at 684 per Keith and Anderson JJ.

81 *In re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

extinguish any subsisting Māori customary title to the foreshore and seabed. This, however, was not all that the Act attempted to do. It specifically protected public rights of access "in or on" (although not "to") the public foreshore and seabed, and provided that "every person has rights of navigation within the foreshore and seabed".[82] The Act endeavoured to sweep the effect of *Ngati Apa* aside by removing from both the High Court and the Māori Land Court their powers under the former law – as stated by the Court of Appeal – and replacing these with new statutory alternatives. Section 10 therefore provided that the High Court's former powers and jurisdiction were fully replaced by the new procedures set out in the Act; and section 12 provided that the Māori Land Court has no jurisdiction to deal with areas of foreshore and seabed under its standard powers under Te Ture Whenua Māori Act 1993. In return both the High Court and the Māori Land Court were given a new statutory jurisdiction. The High Court was given power to make territorial customary rights orders (TCRs) (sections 32–45) and customary rights orders (CROs) (sections 66–91). The Māori Land Court was likewise given a new jurisdiction to make customary rights orders (sections 48–65). Thus, both the High Court and the Māori Land Court could make CROs; TCRS, however, could only be made by the High Court. As Shaunnagh Dorsett has pointed out in an important article, TCRs and CROs are based on a supposed distinction between "territorial" and "non-territorial" aboriginal title, another example of the how Native Title legal discourse has been deployed in the legislation in response to a legal problem which was, in reality, about the territorial extent of the jurisdiction of the Māori Land Court.[83]

Following an inquiry into the 2004 Act by a Ministerial Review panel in 2009 (of which Richard Boast was a member) the FSA was repealed and has now been replaced with new legislation, the Marine and Coastal Area (Takutai Moana Act) 2011. (One problem with the 2004 Act was that the thresholds had been set so high that no orders of any kind had been made under it.) The 2011 Act has a number of structural affinities with its predecessor. Both Acts make provision for a general vesting of the foreshore and seabed, and both make provision for two kinds of orders relating to the protection of customary rights at the "macro" and "micro" levels. Both Acts involve a considerable number of consequential amendments to the Resource Management Act. There are those who claim that the 2011 Act gave far too much away to Māori, and there are others those (such as Hone Harawira) who argue that the 2011 Act does not significantly change anything. These respective stances obviously cannot both be correct, although it is certainly possible that neither is.

As seen, the FSA vested the whole of the "public" foreshore and seabed in the Crown. This is reversed by section 11 of the Marine and Coastal Area (Takutai Moana Act) 2011, which gives to the "common marine and coastal area" a "special status". This status is sui generis and is defined by the statute itself. Just as the "public" foreshore and seabed was vested in the Crown, the "common" marine and

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82 Foreshore and Seabed Act 2004, s 7.

83 See Shaunnagh Dorsett "Aboriginal rights in the Offshore: Māori Customary Rights under the Foreshore and Seabed Act 2004 (NZ)" (2006) 15 GLR 25 at 88.

coastal area acquires this new status under the statute. Section 11 is a very remarkable provision as it, in effect, creates a whole new category of land which has never existed before. Lawyers recognise, and law students have long been taught, that there are four categories of land in New Zealand: Māori customary land; Māori freehold land; Crown land; and general land, each regulated by their own statutes (Te Ture Whenua Māori/Māori Land Act 1993 for the first two, the Land Act 1948 for Crown Land and the Land Transfer Act 1952 for general land). But now we have a fifth category, which we can call common marine and coastal area land. ("Marine land" is one possible abbreviated name for it.) Since it comprises the entire territorial sea, estuaries, the foreshore and to some extent the beds of navigable rivers, it is an area of no mean size. There may be more land in this category than there is Māori freehold land for instance – which covers 5.6 per cent of the country, almost entirely in the North Island. This is land which, by statutory fiat, belongs to no one – a concept that common lawyers, brought up to believe that all land has to belong to somebody, have some trouble dealing with. This really is a revolution in our country's land law system. The last occasion on which a new tenurial category was created was perhaps with the Native Lands Act 1865 or maybe the Land Transfer Act 1870 (depending on whether one sees general land as a wholly new category, or whether it was simply a statutory recasting of Crown-granted freehold tenures). Not only is this unique in the sense of being a novelty for us, it is also unique internationally – it is not easy to think of any exact parallels overseas. It is intriguing that this invention of a new kind of sui generis title has not received more attention than it has. Property lawyers seem to be taking it all very calmly.

The entire foreshore and seabed saga illustrates the propensity of our legislators to play fast and loose with property rights and indeed with core concepts of property which is difficult to imagine happening in more conservative and more complicated jurisdictions like Australia and the United States. The legislation illustrates another tradition – apart from the tendency towards resource nationalisation – that is, a proneness to resolving complicated problems arising from our peculiar political, ethnic and historic make-up by erecting edifices of statute. The 2004 Act took away the ability of Māori to go to the Māori Land Court to obtain private freehold titles to areas of foreshore and seabed, and this ability has not been restored by the 2011 Act. (In fact the 2011 Act gives even fewer powers to the Māori Land Court than the 2004 Act.) Both Acts did indeed "impair" the property rights of iwi, and the enactment of the Regulatory Standards Bill into law might indeed caution against the state from embarking on a similar exercise in the future.

One can say, of course, that that would be no bad thing, putting to one side the possibility that in the event of a similar policy crisis – over water, or navigable river beds perhaps (both are certainly possibilities) – the government might just exclude whatever legislation it chose to enact from the requirements of the Regulatory Standards Bill or any other equivalent legislation. But there is also an argument, which we would say certainly deserves to be taken very seriously, that given New Zealand's particular traditions and circumstances – including a large and politically aware indigenous population, advised by astute lawyers, and a reasonably sympathetic judiciary – the state might not be wise to impede itself from devising

particular legislative solutions by setting in place a very blunt statutory instrument which decrees the compensability of all impairments of property rights.

Take, for example, the issue of the ownership of riverbeds. This question is not a remote or fanciful one, but is actually the subject of litigation in the Supreme Court at the present time. The Supreme Court has recently concluded in a major decision that a particular stretch of the Waikato River in the central North Island was not navigable and, for that reason, was not vested in the Crown on that basis.[84] Round two of the case (yet to be argued) is whether the Crown as owner under the "ad medium filum aquae" rule[85] owns the bed under a fiduciary obligation for a certain community of Māori former riparian owners. The case is very much a case about property rights, and *Paki* is potentially a case with significant implications. Again the state will have to decide whether to let the cases run in the courts to see what happens, or enact special purpose legislation to enact into place a political solution. Implementing political deals between Māori and government politicians is another long-standing political tradition in this country, and sometimes those deals might just have to "impair" the property interests of some people. Protection of property rights is important, obviously, but equally important in the political configurations in play in this country is the ability of the state to put in place workable solutions to complicated legal and political problems. It is not easy to see clearly which is the true responsibility of the state – that is, to let litigation over rivers run on indefinitely, and at whatever cost and whatever political risk – or to take some action to negotiate an arrangement and legislate it into place even if that deprives some people of property rights they might otherwise have had. An explanation to the legislature that the step of overriding property rights in the pursuit of a broader national good could nevertheless serve a useful purpose, help to channel debate, and perhaps restrict any possible legislative solution in terms of its scope and range.

9.8 Conclusion

The above brings us to a main theme of our approach to this subject. Protection of property rights is not an absolute and eternal value. It is contextual and works within political, cultural, and legal traditions. Our existing law has its flaws, certainly. The compensable regulation problem is of some importance, although the extent of its significance needs to be demonstrated rather than assumed. The state should probably become less prone to resource nationalisation, although it is perhaps hard to see what is left out there which remains to be acquired. Licensing

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84 John Hanita Paki, Toriwai Rotarangi, Taihopa Te Wano Hepi, Matiu Mamae Pitoroi and George Mongamonga Rawhiti: *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277.

85 The issue in *Paki* was not whether the Crown held title to the bed of the river, but rather on what basis. The Crown claimed title on the basis that the bed of the river was "navigable" and for this reason it vested absolutely in the Crown under the Coal-Mines Amendment Act 1903, the effect of which has been preserved by section 354 of the Resource Management Act 1991. In rejecting this argument, the Supreme Court has found that the Crown is still the owner under the ad medium filum aquae presumption, by which a riparian owner owns the bed of the river out the mid-line of the river bed. (The case was not about water as such, which is regarded as an unowned resource at common law.).

based on state acquisition is how our entire environmental law system operates. Whether the provisions of the Regulatory Standards Bill actually are well-designed to fit with *our* particular problems is the issue. They have the flavour of a party-political statement rather than a considered response to gaps and ambiguities in the law. In the words of the Waitangi Tribunal – which arose in the context of the Crown's proposals to legislate in response to the *Ngati Apa* decision in 2003 – there probably needs to be a "longer conversation". The explanatory notes approach may perhaps provide a venue for that conversation. The risk of overseas investors having greater rights than New Zealanders to claims of regulatory takings may be a chill factor that passing regulation will not be done because of the perceived threats of impairment of property. Thus, even the explanatory notes proposal will need to be carefully monitored and its uses evaluated and weighed.